No. 15,007.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BENMATT ORGANIZATION, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
ROBERT N. ANDERSON,
DAVIS W. MORTON, JR.,
Attorneys,
Department of Justice,
Washington 25, D. C.

LAUGHLIN E. WATERS,
United States Attorney.

EDWARD R. McHALE,
Assistant United States Attorney.

BRUCE I. HOCHMAN,
Assistant United States Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statute

Miscellaneous

No. 15,007.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BENMATT ORGANIZATION, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

Opinion Below.

The opinion, findings of fact and conclusions of law of the District Court [R. 17-26] are reported at 134 F. Supp. 511.

Jurisdiction.

This appeal involves manufacturer's excise taxes in the amount of $8,501.78 paid during the period from November 1, 1947, through October 31, 1949. [R. 23.][1] Claim

---

[1]*Benmatt Organization, Inc. v. Riddell, Collector,* No. 15,008, is a companion case. The parties have stipulated that decision in No. 15,008 will abide final judgment in the instant case. The amount involved in No. 15,008 is $29,783.06.

for refund was filed with the Collector at Los Angeles on December 31, 1951. [R. 6.] Such claim was denied in full on August 5, 1952. [R. 7.] Suit for refund was commenced in the District Court within the time provided for by Section 3772 of the Internal Revenue Code of 1939 on July 7, 1954. [R. 4-8.] Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1346. The judgment of the District Court was entered on October 24, 1955. [R. 31.] Within sixty days, or on December 16, 1955, notice of appeal was filed by the taxpayer. [R. 31.] The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1291.

Question Presented.

Whether the District Court erred in holding that taxpayer's product, a license plate frame identifying an individual automobile dealer's name and products and designed to be attached to the dealer's customer's automobile, was taxable as an automobile accessory, within the meaning of Section 3403(c) of the Internal Revenue Code of 1939.

Statute and Regulations Involved.

The pertinent statute and Regulations involved are set forth in the Appendix, *infra*.

Statement.

The pertinent facts, as stipulated [R. 14-16] and found by the District Court [R. 22-25], appear as follows:

Taxpayer is a California corporation having its principal place of business in Los Angeles. [R. 22-23.] It manufactures and sells three types of license plate frames. One type, which is the product here under con-

sideration, is manufactured for automobile dealers and advertises the dealer's name and products. [R. 23, 24.] A second type, Exhibit 1-b, bears the name of the city or state. The third Exhibit 1-c, is plain. [R. 24-25.]

The automobile dealers who purchased license plate frames for advertising with their names upon them did not charge their customers for them. The cost to the automobile dealers was reflected on their books as "advertising expense" or "other expense." [R. 24.]

The frames here in issue were purchased by automobile dealers who did not resell them. [R. 14.] On the other hand, the license plate frames which bear the name of a state or city or which are plain [Exs. 1-b and 1-c] can be purchased in any automobile accessory store. [R. 25.] In the latter connection, the parties stipulated that the managers of leading accessory stores would be willing to testify that their firms handled Types 1-b and 1-c license plate frames manufactured by taxpayer, sold them to customers in the ordinary course of business, and advertised them as commodities to be purchased for the adornment of automobiles, the protection of license plates, and the complementing of other chrome on the automobile. [R. 15-16.]

Taxpayer paid $98,747.04 in manufacturer's excise taxes, between November 1, 1947, and March 31, 1951. On or about December 31, 1951, taxpayer filed its claim for refund in such amount, which was disallowed in full. Subsequently, taxpayer obtained written consents from ultimate purchasers (dealers) to an allowance of such refunds in the amount of $38,284.84. Of this amount, the $8,501.78 herein suit was paid to former Collector Harry C. Westover during the period from November 1, 1947, to October 31, 1949, inclusive. [R. 23.]

Specifically, the District Court found, with respect to the dealer plates here in issue [R. 24-25]:

VII.

The tax imposed is on the manufacturer's sale price of the manufactured article and whether the ultimate purchaser sells them or gives them away has no bearing on the tax liability of the manufacturer.

VIII.

The license plate frames in dispute are primarily adapted for use on motor vehicles. They are constructed to be affixed to automobiles by bolts, add to the utility, and become a component part of the automobile as well as an ornament. They also protect the license plate from the elements and prevent vibration.

* * *

X.

A license plate frame remains a license plate frame whether it bears an advertisement or not.

XI.

The license plate frame with the dealer's name upon it is merely a frame with advertising molded into it, and is, and remains an automobile accessory under Section 3403(c) of the Internal Revenue Code of 1939.

On the basis of his opinion [R. 17-22], findings [R. 22-25], and conclusions of law [R. 25-26], the District Court rendered judgment for the United States on October 11, 1955, which judgment was filed on October 24, 1955. [R. 30-31.] On the day of filing the judgment, taxpayer filed its written objections to the Government's proposed findings of fact and conclusions of law [R. 26-29], specifically alleging, *inter alia* [R. 27], that it had, under

the terms of the stipulation [R. 14-16], objected to the materiality, relevancy or competency of the introduction of Exhibits 1-b and 1-c, which constitute the non-dealer types of license plate frames manufactured by taxpayer. On the same day, the District Court made his order overruling this objection, which order was filed on October 25, 1955. [R. 29.] Thereupon, taxpayer filed its notice of appeal with this Court on December 13, 1955. [R. 31.]

Summary of Argument.

The District Court correctly held that dealer identification license plate frames manufactured by taxpayer were subject to excise tax as automobile "accessories," within the meaning of Section 3403(c) of the 1939 Code and Section 316.55 of Treasury Regulations 46.

Under the facts, as stipulated and found, it is clear that the subject dealer-frames—as is true of any manufactured license plate frame, whether incorporating advertising matter or not—are primarily adapted for use on automomiles, being constructed to be affixed thereto by bolts, and serving in such use to protect the license plate from the elements, to prevent vibration, and to improve, ornamentation-wise, the appearance of the car. As the District Court held, any or all of these essential characteristics of an automobile "accessory" are properly the subject of judicial notice. As additional supporting evidence, the District Court also, we submit correctly, admitted evidence, which had been stipulated to by taxpayer but was later objected to at the trial, that non-dealer frames, also manufactured by taxpayer, are sold to the public in accessory supply stores and are regarded as automobile accessories in the trade.

Patently, the above facts, as found below, come within the four corners of the established definitional requirements of an automobile "accessory" as set out in Section 316.55(a) of Treasury Regulations 46, which have long been accorded the full force and effect of law under the United States Supreme Court's decision in *Universal Battery Co. v. United States,* 281 U. S. 580. Under such established requirements, the term "accessory," in contrast to a taxable "part" and directly contrary to taxpayer's instant attempt to limit taxability to articles "basically integrated to the operational and functional needs of an automobile," expressly includes (a) "any article the primary use of which is to improve * * * such vehicle," (b) "any article designed to be attached to or used in connection with such vehicle * * * to add to its utility or ornamentation" *or* (c) "any article the primary use of which is in connection wtih such vehicle * * * whether or not essential to its operation or use." Under all of these mutually independent definitions, neither of which makes the presence or absence of advertising matter a criterion for determination of taxability, the dealer-frames here before the Court qualify on all squares, under the facts presented, as an automobile "accessory." Moreover, since the excise can properly be analogized to a sales tax on the manufacturer, in contrast to a use tax, the District Court quite properly treated the fact that advertising matter was incorporated therein and that the purchaser-dealers gave the frames to their customers as irrelevant to the determination of accessory-status.

On the other hand, the contentions raised against taxability by the taxpayer are without merit. Since the dealer-frames and the non-dealer frames manufactured by taxpayer meet all of the requirements for a taxable "acces-

sory," it is of no avail to attempt to obviate this fact of qualification for excise by attempting to fuse into the independent test for accessory-status the mutually exclusive independent test for taxability as a "part." Neither does it aid taxpayer to attempt to ignore the acknowledged fact that the Supreme Court, in *Universal Battery Co. v. United States, supra,* expressly directed its analysis to both the definition of a "part" and an "accessory" and placed its imprimatur on the validity and reasonableness of both tests, as used in the Treasury Regulations. Again, the cases relied on by the taxpayer in its futile attempt to avoid tax are either clearly distinguishable on the facts, as is true in *Cuno Engineering Corp. v. United States,* 43 F. 2d 259 (C. Cls.), or faulty in their analysis, as can clearly be demonstrated in the case of *Smith v. McDonald,* 214 F. 2d 920 (C. A. 3d).

Finally, taxpayer's argument that its manufacture of license frames amounted only to a sale of labor and materials is a poorly disguised attempt to ignore the obvious fact that the manufactured products are primarily adapted for attachment to automobiles and adjustable to all types of plates; its argument against the introduction in evidence of non-dealer frames, while inconsistent with its basic contention that both dealer and non-dealer frames should not be taxed, is ineffective, since such evidence, while not essential to sustain the lower court's judgment, is relevant to the advertising contention raised by taxpayer and, in any event, could be brought in by judicial notice; and, lastly, its argument for a favorable construction of Section 3403(c) loses all significance in a case where, under the strictest favorable construction possible, the facts so compellingly demonstrate that the manufactured product in question is an "accessory."

ARGUMENT.

The District Court Correctly Held That the License Plate Frames Manufactured and Sold by the Taxpayer Identifying an Individual Automobile Dealer's Name and Products, Which Was Designed To Be Attached to the Customer's Automobile—Were Taxable as Automobile "Parts or Accessories" Within the Meaning of Section 3403(c) of the Internal Revenue Code of 1939.

Under the facts as stipulated and found, we submit that the District Court correctly held that taxpayer's dealer identification license frames were subject to manufacturer's excise tax as "parts or accessories," within the established meaning of Section 3403(c) of the Internal Revenue Code of 1939 (Appendix, *infra*), as that meaning has been developed both in the relevant Treasury Regulations and by the pertinent decisions of the Courts.

A. The Statute.

Section 3403 of the Internal Revenue Code of 1939 (Appendix, *infra*), insofar as is here applicable, provides:

> "SEC. 3403. TAX ON AUTOMOBILES, ETC.
>
> "There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax * * *
>
> * * * * * * * *
>
> "(b) [as amended by Sec. 544(a), Revenue Act of 1941, c. 412, 55 Stat. 687] *Other automobile chassis and bodies,* * * * (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof), * * * 7 per centum. * * *

"(c) [as amended by Sec. 544(b), Revenue Act of 1941, *supra*] Parts or accessories (other than tires and inner tubes and other than radios) for any of the articles enumerated in subsection (a) or (b), 5 per centum. For the purposes of this subsection and subsections (a) and (b), spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, any of the articles enumerated in subsection (a) or (b), shall be considered parts or accessories for such articles, whether or not primarily adapted for such use. This subsection shall not apply to chassis or bodies for automobile trucks or other automobiles. * * *" (Emphasis supplied.)

B. The Treasury Regulations.

Section 316.55 of Treasury Regulations 46 (Appendix, *infra*) provides:

"Sec. 316.55 [as amended by T. D. 5099, 1941-2 Cum. Bull. 267] *Definition of Parts or Accessories.* —The term 'parts or accessories' for an automobile truck or other automobile chassis or body, taxable tractor, or motorcycle, includes (a) *any article the primary use of which is to improve,* repair, replace *or serve as a component part of such vehicle* or article, (b) *any article designed to be attached to or used in connection with such vehicle* or article *to add to its utility or ornamentation, and* (c) *any article the primary use of which is in connection with such vehicle* or article *whether or not essential to its operation or use.* However, such term does not include tires, inner tubes, and automobile radios, since these articles are expressly excluded by the statute from the tax on parts or accessories. With respect to fare

registers and fare boxes for use on busses and automobiles, see section 316.140.[2]

"The term 'parts and accessories' shall be understood to embrace all such articles as have reached such a stage of manufacture that they are commonly or commercially known as parts and accessories whether or not fitting operations are required in connection with installation. The term shall not be understood to embrace raw materials used in the manufacture of such articles.

"Spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, automobile truck or other automobile chassis, taxable tractors, or motorcycles, are considered parts of or accessories for such articles whether or not primarily designed or adapted for such use." (Emphasis supplied.)

C. The Demonstrated Correctness of the District Court's Application of the Statute and Regulations.

As can readily be seen from the foregoing, Section 316.55 of Treasury Regulations 46 (Point B, *supra*) enumerates *three* mutually exclusive, independent criteria for determining that a manufactured item is taxable under Section 3403(c) of the 1939 Code as a "part" or an "accessory." In the context of the present case, the item will so qualify if: (1) Its "primary use * * * is to improve * * * such vehicle [automobile chassis or body] * * *"; (2) it is "designed to be attached to or

---

[2]Under Section 316.140 of Regulations 46, as added by T. D. 5099, *supra,* fare registers and fare boxes are taxable as business machines under Section 3406(a)(6) of the 1939 Code "and not as automobile accessories under section 3403(c), as amended."

used in connection with such vehicle * * * to add to its utility or ornamentation"; or (3) its "primary use * * * is in connection with such vehicle * * * whether or not essential to its operation or use."

With respect to their validity, the enumerated tests for taxability set forth in the Regulations have long been accorded the full force and effect of law. In *Universal Battery Co. v. United States,* 281 U. S. 580, the Supreme Court, in 1930, had occasion to pass upon the validity of the substantially comparable Regulations defining the term "part or accessory," as used in Section 900 of the Revenue Acts of 1918, c. 18, 40 Stat. 1057, and 1921, c. 136, 42 Stat. 227.[3] Speaking for a unanimous Court, Justice Van Devanter stated (pp. 583-584):

> "The administrative regulations issued under §900 uniformly have construed the term 'part' in that section as meaning any article designed or manufactured for the special purpose of being used as, or to replace, a component part of such vehicle, and which by reason of some characteristic is not such a commercial article as ordinarily would be sold for general use, but is primarily adapted for use as a component part of such vehicle. The regulations also have construed the term 'accessory' as meaning any article designed to be used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for such use, whether or not essential to the operation of the vehicle.
>
> "The construction of those terms has been adhered to in the Internal Revenue Bureau for about ten years and it ought not to be disturbed now unless it be plainly wrong. We think it is not so,

[3]Section 900 of the Revenue Acts of 1918 and 1921, *supra,* was the statutory forerunner of Section 3403 of the 1939 Code.

> but is an admissible construction. Certainly it would be unreasonble to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles. And it would be also unreasonble to hold that articles can be so classified only where they are adapted solely for use in motor vehicles and are exclusively so used. *Magone v. Wiederer,* 159 U. S. 555, 559. *We think the view taken in the administrative regulations is reasonable and should be upheld. It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted."* (Emphasis supplied.)

Under the facts presented in the instant case,[4] we submit that the District Court was entirely justified in applying the tests for taxability set forth in Section 316.55 of Treasury Regulations 46, with the result that it correctly determined that the dealer's identification license plate frames manufactured by taxpayer were properly taxable as "parts or accessories" under Section 3403(c). Specifically, with regard to the enumerated administrative tests, the District Court found [R. 24]:

> "The license plate frames in dispute are primarily adapted for use on motor vehicles. They are constructed to be affixed to automobiles by bolts, add to the utility, and become a component part of the

---

[4]As the District Court pointed out [R. 21], in applying the Regulations' definitional tests for a "part" or an "accessory" under Section 3403(c), each case deepnds upon the particular facts presented. *Cuno Engineering Corp. v. United States,* 43 F. 2d 259, 262 (C. Cls.)

> automobile as well as an ornament. They also protect the license plate from the elements and prevent vibration."

With respect to the fact that the dealer frames contained advertising matter, the trial judge found [R. 25]:

> "A license plate frame remains a license plate frame whether it bears an advertisement or not."

Taken together, these findings, which derive their justification from the entire evidence presented, independent of the introduction of Exhibits 1-b and 1-c, to which taxpayer now strenuously objects (Br. 21), more than comply with all three of the established Regulations' tests for determination of the character of a manufactured item as a taxable "accessory." License plate frames, regardless of whether they bear the dealer's name or not, are both primarily and *exclusively* used to *improve* the automobile on which they are mounted; they are designed to be bolted on—viz., *attached*—and, when mounted, insure a minimum of plate vibration as well as added protection from rust while, at the same time, improving the appearance—viz., *ornamentation*—of the car; and, finally, albeit not essential to the car's operation and use, there would be no purpose in manufacturing the frames except for use in connection with an automobile. *Universal Battery Co. v. United States, supra; Masterbilt Products Corp. v. United States,* 42 F. Supp. 294, 296 (C. Cls.).

As the District Court below succinctly pointed out [R. 20], the essential findings supporting taxability in the case of license plate frames—viz., primary use, purpose to improve, fact of attachment, increment in utility and ornamentation—do not depend for their establishment on the fact that such frames are classified as automobile accessories in the trade [R. 19], since each of

these well-known characteristics are a proper subject of judicial notice. [R. 20.] *Cadwalader v. Zeh,* 151 U. S. 171, 176. Indeed, the fact that non-dealer frames are classified in the trade as automobile accessories and can be purchased at Pep Boys, Western Auto Supply, Sears, Roebuck and Co., or any other adequately stocked accessory store does not, in this context, depend on the stipulations of counsel [R. 15-16] for its factual existence; this, too, is a proper subject for judicial notice, just as is the fact that license plate frames are put to the identical use by an automobile owner and improve, add utility, and ornament his car, whether they bear the dealer's name, the owner's name, the home town's name, or serve no identification purpose whatsoever. Moreover, the fact that dealer-frames, such as those here in suit, do double duty, in that they afford an opportunity to advertise the dealer's name, is just as proper a subject of judicial notice as the foregoing observations. However, their value as an advertising medium, we submit, is derived from the fact that the ear-marked frames are automobile accessories possessing the vehicle-enhancing characteristics which prompt the recipients to mount them on their cars as such. The District Court, we submit, saw all too clearly the circuitous dilemma which, here, necessarily plagues *any* attempt to argue that license plate frames, *of any kind,* are *not* accessories, when he stated [R. 21]:

> "Plaintiff has overlooked the fact that we are dealing with an excise tax on the manufacturer, which in effect is a sales tax at the source not a retailer's sales tax. The tax is on the sale price of the manufactured article and not on the use it is put to by the dealer-purchaser. The manufacturer makes these frames for a purpose and a price. Whether the dealer-purchaser gives them to his customers or sells

them is immaterial to any issue in this case. [*Williams v. Harrison,* 110 F. 2d 989; 51 Am. Juris. p. 61; 33 C. J. S., p. 111.]"

D. The Lack of Merit in Taxpayer's Arguments.

The correctness of the District Court's decision below is underscored when attention is directed to the basic inconsistencies in taxpayer's brief filed with this Court on appeal.

In combined Points I and II (Br. 6-19) taxpayer attempts to argue that no license plate frames, whether dealer-frames (Point I) or non-dealer frames (Point II) are automobile accessories for federal excise tax purposes. To make this argument, it becomes necessary (Br. 6-7) to contend that license plate frames—unlike "spark plugs, storage batteries, leaf-springs, coils, timers, and tire-chains"—do not serve "an operational and functional need of an automobile." In view of the discussion above (Points B and C, *supra*) of the definition of *both* a *part* and an *accessory* in the applicable Treasury Regulations, the result produced is confusion of the "component part" concept with the equally significant and here controlling criteria of "improvement," "attachment," "utility," "ornamentation" or "primary use" which delineate a taxable "accessory." See also *Universal Battery Co. v. United States,* 281 U. S. 580, 583-584, where the independent definitions developed by the Treasury Regulations for both a "part" and an "accessory" are set forth and approved.

Moreover, while arguing that its non-dealer frames are *not* accessories (Br. 6), taxpayer attempts to attribute the trial judge's determination that dealer-frames *are* accessories to an alleged inadvertent misreading of the stip-

ulation [R. 15-16] as to which types of frames are sold to the general public in accessory stores (Br. 7). Such is clearly *not* the case. Finding IX [R. 25] specifically indicates that it is the *non-dealer* frames [Exs. 1-b and 1-c] to which the trial judge refers when he states in his opinion [R. 19]:

> "The evidence in this case discloses that *automobile license frames* can be purchased at any automobile accessory store, *which in itself indicates their classification by the trade.*" (Emphasis supplied.)

Neither does any significance attach, for purposes of excise tax applicability, to taxpayer's bootstrap attempt to argue (Br. 7-8) that dealer frames *are* "advertising devices" exclusively, and *not* accessories, simply because they are not included in the category of frames sold in auto supply stores. That the marketing channel utilized in distributing the dealer frames has no relevance to the applicability of the definitional test for a taxable "accessory" is expressly covered by the District Court's reasoning [R. 20-21] when he points out that (a) a frame is a frame, just as a pack of matches is a pack of matches, irrespective of the advertising message it carries, and (b) the excise is on the manufacturer and not on the user, which, of course, makes the channel of distribution utilized in the case of dealer-frames an irrelevant coincidence.

The above comparison serves, further, to highlight taxpayer's unrealistic attempt (Br. 9-13) to ignore the mutually exclusive independence of accessories, vis-a-vis, parts, as a basis for excise tax liability when it discusses *Universal Battery Co. v. United States, supra,* and *Cuno Engineering Corp. v. United States, supra.* In discussing *Universal Battery* (Br. 10), taxpayer succeeds in

confusing the term "use," as included in the quoted "rule" (Br. 9), with "utility," which is expressly used in the Regulations' definition of an "accessory" as approved by the Supreme Court.[5] The attempt (Br. 10, 12), albeit futile, is one to limit taxable "use" to articles deriving their "utility" from being "basically integrated to the operational and functional needs of an automobile" and thus merge the characteristics of a taxable "part" into the clearly contrasted and independent definitional requirements of a taxable "accessory."[6] This, we submit,

---

[5]See *Universal Battery Co. v. United States,* 281 U. S. 580, 583-584. The quoted "rule" reads (p. 584):

> "* * * articles primarily adapted for *use* in motor vehicles are to be regarded as *parts* or *accessories* of such vehicles, even though there has been some other use of the articles for which they are not so well adapted. (Emphasis supplied.)

As the approved definitions of "part" and "accessory," which the Court set out (p. 583) prior to stating the above-indicated "rule," clearly indicate, the word "use" modifies both "part" and "accessory," whereas the word "utility," which only appears in the definition of "accessory," is no more significant as a touchstone for determining taxability than is "ornamentation," with which it is alternatively linked. So appearing, it comprehends, in and of itself, an increment in "utility" apart from the obvious utility attaching to an integrated component part. In other words, in direct contradiction of the position taken by the taxpayer herein (Br. 9-13), an "accessory," in contrast to a "part," does not depend for its excise tax incidence on the taxable articles being integrated to the operational or functional needs of an automobile nor on its contribution to those needs. This distinction is made clear in the Supreme Court's adoption of the two contrasting definitions (p. 583): (1) *A "part"* means "any article designed or manufactured for the special purpose of being *used as,* or to replace, *a component part* of such vehicle, and which by reason of some characteristic is not such a commercial article as ordinarily would be sold for general use, but is *primarily adapted* for use as a component part of such vehicle" (emphasis supplied); and (2) *an "accessory"* means "any article designed to be *used* in connection with such vehicle to add to its *utility* or ornamentation and which is *primarily adapted* for such use, whether or not essential to the operation of the vehicle." (Emphasis supplied.)

[6]See fn. 5, *supra.*

amounts at best to a baseless contention which is expressly repudiated by both the provisions of Section 316.55 of Treasury Regulations 46 and by the rationale of *Universal Battery Co. v. United States, supra.*[7]

Apart from taxpayer's groundless attempt to argue directly against long-established definitional principles which are here controlling, the weakness of taxpayer's argument is glaringly highlighted by its contention against the District Court's taking judicial notice of the "utility and use" of the license plate frames on automobiles. Taxpayer contends (Br. 13) that no weight should attach thereto since the Court might as well take judicial notice "that thousands of automobiles do not use or employ license plate frames." This represents, we submit, merely an extension of taxpayer's distorted construction of the separate and independent definitional requirements of a "part" or an "accessory." The fallacy emerges when it is considered that thousands of cars are not equipped with spot-lights but it would take a hardy soul to argue that spot-lights are not automobile accessories.

Unconvincing also is taxpayer's strenuous argument against the District Court's refusal to treat the inclusion

---

[7]Taxpayer's reliance on *Cuno Engineernig Corp. v. United States, supra* (Br. 10-12), is likewise not warranted. Although the Court of Claims handed down its opinion in that case on June 16, 1930, a few weeks prior to the Supreme Court's decision in *Universal Battery Co. v. United States, supra,* the two decisions can be reconciled on their facts, which serve to distinguish the different results attained. In *Cuno Engineering,* the court found (Finding II, p. 260) that the electric cigar lighters in issue which had removable heating units, were interchangeably adaptable to both household and vehicular use and, accordingly (Finding IV(b), p. 261), that the articles sought to be taxed were *not primarily adapted* for use on motor vehicles, a deficiency which would, under the *Universal Battery Co. definition* (fn. 5, *supra*), preclude them from taxability as *either* "parts" or "accessories."

of advertising matter as determinative of accessory status. (Br. 14-19.) The first example cited (Br. 15) for the contention that such inclusion "qualifies and changes the character of such frames * * * and classifies them as advertising media or devices" is the familiar work clothing deduction, where, subject to the express limitations of Mim. 6463, 1950-1 Cum. Bull. 29, deduction is administratively allowed, in conformance with a line of earlier court decisions adverse to the Commissioner. The analogy, however, fails of persuasiveness, since the deduction, if permitted, is based on the factual determination that an expense was incurred business-wise, rather than for personal reasons. In contrast to a deduction situation, which is axiomatically a matter of legislative grace, the present case involves a manufacturer's excise tax which is assessable against taxpayer's product, by established definition, as an automobile "accessory," irrespective of whether advertising matter is affixed to the product or not. The statute and the pertinent Regulations do not make advertising a criterion for determination of accessory status and no administrative discretion in the premises is conferred under the statute. The only factual determination relevant to taxability is the determination that automobile license plate frames, regardless of whether they are essential to operation, are primarily adapted for attachment or use in connection with automobiles and improve the car or add to its utility or ornamentation.

Again, in connection with taxpayer's reliance (Br. 16-19) on *Smith v. McDonald,* 214 F. 2d 920 (C. A. 3d), we submit that the issue upon which the reversal of the District Court there was made to turn is not presented in the instant case. In the *Smith* case, the taxpayer manufactured an electric sign designed to be attached to the top of a taxicab. Over the Collector's vigorous

objection, the Third Circuit held that such taxi lights were not subject to excise tax as accessories.

We respectfully submit that the basic Section 3403(c) issue was obscured in *Smith v. McDonald, supra,* due to the Third Circuit's preoccupation with a 1941 amendment to Section 316.55 of Treasury Regulations 46 (T. D. 5099, 1941-2 Cum. Bull. 267) which obliquely touched upon the "taxicab" business in that it referred to "fare registers" and "fare boxes" and made cross-reference to Section 316.140 of Treasury Regulations 46, as added by T. D. 5099, *supra,* which provides (p. 922):

> "(c) Fare registers and fare boxes for use in street cars, busses, and other vehicles are *taxable as business machines* [emphasis ours] under section 3406(a)(6) *and not as automobile accessories under section 3403(c) I. R. C., as amended.*" (Emphasis supplied.)

Proceeding on the theory that *taxi* signs were analogous to *taxi* meters, which were thus removed from the "accessories" excise tax imposed by Section 3403(c), the Third Circuit, *we believe erroneously,* held that taxi signs were not accessories.

The fact is that Section 316.140 of Treasury Regulations 46 does not purport to hold that fare registers and fare boxes are not automobile accessories, within the meaning of Section 3403(c) of the 1939 Code. Instead, it is premised on the proposition that such devices, because they each have built-in mechanisms, qualify under *both* Section 3403(c), as "accessories," and Section 3406(a)(6), as "business machines." Since the then prevailing tax on "business machines" was ten per cent, whereas the rate on "accessories" was five per cent, the Regulations were promulgated to provide, in the interests

of securing the highest revenue, that fare registers and fare boxes would thereafter be taxed as "business machines." However, since such an administrative decision did not alter the realistic fact that the products in question also remained "accessories," in order to prevent the devices from being taxed *twice* (first, as "accessories" and, secondly, as "business machines"), Section 316.140 announced that they would *not* be *taxable* as "accessories," under Section 3403(c). In other words, the fact that Section 316.55 of Treasury Regulations 46 was amended in 1941, with the result described above, furnishes no precedent whatsoever for the Third Circuit's determination that electric taxi signs attached to the top of taxicabs are not accessories. On the basis of the Third Circuit's own treatment of them as analogous to fare registers and fare boxes, which are and remain automobile accessories, they should properly be regarded, for excise tax purposes, as "accessories," within the meaning of Section 3403(c).

In any event, since, in the present case, unlike *Smith v. McDonald, supra,* there is no administrative determination that dealers' automobile license frames should be taxed in any category *other* than as automobile accessories, it can readily be seen that such frames, since their manufacture, sale, and use fully comply factually with the definitional requirements of an "accessory," within the meaning of Section 316.55 of Treasury Regulations 46, should properly be taxed under Section 3403(c). *Smith v. McDonald, supra,* insofar as it involved an administrative option as to a choice between two equally applicable excises, can here be considered distinguishable. However, since the result reached was to hold attached taxi signs not to be "accessories," it should not here be fol-

lowed as a precedent. For a well-considered judicial opinion analyzing *Smith v. McDonald, supra,* and reaching the same conclusion expressed above, see *Masao Hirasuna v. McKenney,* 135 F. Supp. 897 (Hawaii) (now pending on appeal before this Court). There, Chief Judge McLaughlin stated, *inter alia* (p. 899):

> "Tires and inner tubes are indisputably parts or accessories for automobiles. Yet, like radios, tires and inner tubes are excluded from the tax in the same paragraph. Exclusion does not determine status for Congress may exclude any article from taxation even though such article is clearly a part or accessory. Indeed, the more reasonable construction is that Congress excluded these items from the tax because otherwise they would be taxable as parts or accessories. Fare registers and fare boxes are taxed as business machines and exempt as parts or accessories lest a taxpayer be twice taxed for the same items. This tax pattern also achieves desirable uniformity without doing violence to the definition of parts and accessories. The enumeration of these items does not serve as examples of what is not an accessory, but merely enumerates what shall not be taxed as accessories. It hence cannot be relied on as a test of what is an accessory. Concededly these affixed electric advertising signs do not add to the utility of an automobile used as a taxicab. However, the definition of parts or accessories under the regulations includes 'any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use.' 26 C. F. R. § 316.55. The electric signs come within the four corners of this definition."

Taxpayer's final three arguments (Br. 19-23) are equally unconvincing. In Point III (Br. 19-20), it attempts to analogize its manufacture of dealer plate frames to a sale of labor and materials, rather than the manufacture of frames as "automobile accessories." The argument here is really an extension of its argument, considered above, that dealer frames are advertising devices, since it is the impression of the dealer's name and product on the dealer frame which distinguishes it from the non-dealer frame. The argument loses its effectiveness when it is considered that *any* manufactured "accessory" involves labor and materials and *any* special "part" or "accessory" does not lose its character as such because it is manufactured for sale to a particular customer, rather than for sale to the general public. Again, *Masao Hirasuna v. McKenney, supra,* (now pending on appeal before this Court), stands as a decision contrary to the two authorities cited by the taxpayer, both of which are factually distinguishable from the instant case.

Point IV of taxpayer's argument (Br. 21) constitutes a renewal of its earlier entered and overruled [R. 29] objection to the introduction of Exhibits 1-b and 1-c, the non-dealer frames. As has been developed in Point C, *supra,* such evidence was not essential to the District Court's findings [R. 22-25] and conclusions [R. 25-26] and had specific relevancy only with respect to Finding IX [R. 25], which, while constituting supporting material, was based expressly on Exhibits 1-b and 1-c. However, in view of taxpayer's present argument (Point II,

Br. 6-19) that non-dealer frames are not "automobile accessories," coupled with insistence that, even if they were (Br. 15), the inclusion of advertising matter would change their taxable character (Br. 14-15), it becomes relevant to consider the characteristics of non-dealer frames, as they are considered in the trade, to reach the here sound conclusion that the presence or absence of advertising matter is entirely irrelevant to the determination of "accessory" status within the meaning of Section 3403(c).

Taxpayer's final argument (Point V, Br. 21-23) that the statute should be construed favorably to it lacks persuasiveness since there is here no doubt as to the applicability of Section 3403(c), under the facts presented. As has been pointed out in Point C, *supra,* the Regulations clearly define the term "part" and "accessory," as used in the statute. Under *Universal Battery Co. v. United States, supra,* it has been long settled that the pertinent Regulations are entitled to be accorded the full force and effect of law. And as was observed with respect to the electric taxicab signs in *Masao Hirasuna v. McKenney, supra,* page 899, the dealer frames here in issue clearly "come within the four corners of this definition." Accordingly, the statute, however strictly construed, is satisfied.

Conclusion.

For the reasons given above, the judgment of the District Court should be affirmed.

Respectfully submitted,

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
ROBERT N. ANDERSON,
DAVIS W. MORTON, JR.,
Attorneys.

Department of Justice,
Washington 25, D. C.,

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. MCHALE,
Assistant United States Attorney,

BRUCE I. HOCHMAN,
Assistant United States Attorney.

June, 1956.

APPENDIX.

Internal Revenue Code of 1939:

"SEC. 3403. TAX ON AUTOMOBILES, ETC.

"There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

"(a) [as amended by Sec. 544(a), Revenue Act of 1941, c. 412, 55 Stat. 687] Automobile truck chassis, automobile truck bodies, automobile bus chassis, automobile bus bodies, truck and bus trailer and semitrailer chassis, truck and bus trailer and semitrailer bodies, tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer (including in each of the above cases parts or accessories therefor sold on or in connection therewith or with the sale thereof), 5 per centum. A sale of an automobile truck, bus, or truck or bus trailer or semitrailer, shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

"(b) [as amended by Sec. 544(a), Revenue Act of 1941, *supra*] Other automobile chassis and bodies, chassis and bodies for trailers or semitrailers suitable for use in connection with passenger automobiles, and motorcycles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 7 per centum. A sale of an automobile, trailer, or semitrailer shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

"(c) [as amended by Sec. 544(b), Revenue Act of 1941, *supra*] Parts or accessories (other than tires and inner tubes and other than radios) for

any of the articles enumerated in subsection (a) or (b), 5 per centum. For the purposes of this subsection and subsections (a) and (b), spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, any of the articles enumerated in subsection (a) or (b), shall be considered parts or accessories for such articles, whether or not primarily adapted for such use. This subsection shall not apply to chassis or bodies for automobile trucks or other automobiles. Under regulations prescribed by the Commissioner, with the approval of the Secretary, the tax under this subsection shall not apply in the case of sales of parts or accessories by the manufacturer, producer, or importer to a manufacturer or producer of any of the articles enumerated in subsection (a) or (b). If any such parts or accessories are resold by such vendee otherwise than on or in connection with, or with the sale of, an article enumerated in subsection (a) or (b) and manufactured or produced by such vendee, then for the purposes of this section the vendee shall be considered the manufacturer or producer of the parts or accessories so resold."

* * * * * * * *

(26 U. S. C. 1952 ed., Sec. 3403.)

Treasury Regulations 46 (1940 ed.):

"Sec. 316.55 [as amended by T. D. 5099, 1941-2 Cum. Bull. 267]. *Definition of Parts or Accessories.* —The term 'parts or accessories' for an automobile truck or other automobile chassis or body, taxable tractor, or motorcycle, includes (a) any article the primary use of which is to improve, repair, replace or serve as a component part of such vehicle or article, (b) any article designed to be attached to

or used in connection with such vehicle or article to add to its utility or ornamentation, and (c) any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use. However, such term does not include tires, inner tubes, and automobile radios, since these articles are expressly excluded by the statute from the tax on parts or accessories. With respect to fare registers and fare boxes for use on busses and automobiles, see section 316.140.

"The term 'parts and accessories' shall be understood to embrace all such articles as have reached such a stage of manufacture that they are commonly or commercially known as parts and accessories whether or not fitting operations are required in connection with installation. The term shall not be understood to embrace raw materials used in the manufacture of such articles.

"Spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, automobile truck or other automobile chassis, taxable tractors, or motorcycles, are considered parts of or accessories for such articles whether or not primarily designed or adapted for such use."

* * * * * * * *